IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DAWN SANDSTROM,	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	**C.A. No. 09C-07-027 MJB**
	)	
AUSTIN AND BEDNASH CONSTRUCTION, INC.,	)	
	)	
	)	
	)	
Defendant.	)	

Submitted: February 22, 2011
Decided: March 29, 2011

Upon Defendant's Motion for Summary Judgment
DENIED.

OPINION AND ORDER

L. Vicent Ramunno, Esquire, Ramunno & Ramunno, P.A., Wilmington, Delaware. Attorney for Plaintiff.

Brian E. Lutness, Esquire, Silverman, McDonald & Friedman, Wilmington, Delaware. Attorney for Defendant.

BRADY, J.

INTRODUCTION

Plaintiff, Dawn Sandstrom, filed this personal injury action against Defendant, Austin & Bednash Construction, Inc. for injuries she suffered as a result of the Defendant's alleged negligence. Defendant filed the instant Motion for Summary Judgment, in which it contends that Plaintiff is required to provide, and has not provided, an expert's opinion to establish the standard of care.[1] While the circumstances of this case would ordinarily require an expert to establish the applicable standard of care, Defendant's duty with respect to the installation of a new curb was established by the Middletown Code (the "Code"). Therefore, no expert testimony is needed, and, as a result, Defendant's Motion is **DENIED**.[2]

FACTUAL BACKGROUND

A. Underlying Incident

Defendant, a commercial construction and paving company, was contracted by Middletown to re-pave streets, and replace sidewalks and curbs.[3] As part of the project, Defendant replaced curbs adjacent to Plaintiff's property by digging out one to two foot trenches on each side of the curb in order to remove it and install a new one. Defendant then re-filled the trenches with the dirt that was removed, and placed grass seed and hay over the area.

According to Plaintiff, before Defendant performed work around her property, there were no holes or depressions, and the front of the lawn met the top of the curb.

[1] Def.'s Mot. 7.
[2] Plaintiff has asserted several bases under which Defendant was negligent, one of which was negligence *per se*. The Court's holding only permits Plaintiff to assert a negligence *per se* claim because under any other theory that has been asserted, an expert opinion would be required to establish the Defendant's duty.
[3] Def.'s Mot. 3.

Subsequent to Defendant's work, Plaintiff noticed holes near the end of her driveway. As a result, she notified the Middletown Public Works, who then contacted Defendant. Defendant then returned to the site, and filled holes at several properties, including Plaintiff's. However, approximately three to four weeks after the initial construction, Plaintiff fell into a hole located next to the curb, injuring her ankle. Plaintiff contends that she did not see the hole because it was covered by grass.[4]

In her Complaint, Plaintiff alleged Defendant was negligent for several reasons. First, Plaintiff alleged that Defendant improperly re-filled the trenches, leaving the worksite and surrounding area in an unreasonably dangerous condition.[5]

Second, Plaintiff claimed that Defendant's conduct violated the Code. Specifically, Plaintiff alleged that the Code required Defendant to use a special product, Select Fill, as a base for the trenches, which then had to be tamped down, and covered by four inches of topsoil, which then was also required to be tamped down.[6]

Third, Plaintiff alleged that Defendant was negligent because it failed to properly identify and repair all holes upon returning to the worksite, subsequent to being notified that holes were present.

B. Defendant's Motion for Summary Judgment

In its Motion, Defendant contends that Plaintiff should be precluded from presenting her claim to a jury, because she has failed to identify a standard of care, or that

[4] Although Plaintiff's Complaint characterizes the hole in which she fell in as "unfilled," it is not clear from the record whether the Plaintiff fell into a hole that was never filled, or into a hole that was filled and subsequently developed a depression.
[5] Compl. at 5.
[6] Pl.'s Resp. Ex. C. p. 15.

Defendant breached such a standard, through presentation of an expert's report or testimony.[7]

C. Plaintiff's Response

In response to Defendant's Motion, Plaintiff contends that no expert testimony is required to establish the applicable standard of care in this case for two reasons. First, Plaintiff argues that the proper way to re-fill trenches behind a curb is "within the knowledge of a lay person."[8] Second, Plaintiff claims that employees of the Defendant have admitted to what their legal obligations were with respect to the re-filling of trenches surrounding the curb.[9]

D. Additional Submissions

On February 3, 2011, by way of letter, the Court requested the parties "to provide a copy of any section of the Middletown Code they believe applicable, so that the Court may properly decide the Defendant's Motion for Summary Judgment…"[10]

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[7] Defendant also contends that there is no evidence, other than Plaintiff's own speculation, that the hole in question was caused by Defendant's conduct, and therefore, the claim should be dismissed. However, Plaintiff's fall occurred next to a curb replaced by Defendant, approximately three to four weeks following the initial construction. Further, Plaintiff had reported other holes that developed, and Defendant returned to the site to repair that condition. There is sufficient evidence supporting Plaintiff's position that the hole was caused by Defendant's construction to allow the matter to proceed. Whether the hole was caused by the Defendant is an issue of fact, which may be resolved by a jury.

[8] Pl.'s Resp. 2.

[9] *Id*. As to this claim, Plaintiff relies upon the deposition testimony of Defendant's president, Michael R. Austin, in which he incorrectly stated that the Code required the use of a product called Select Fill. However, that reliance is misplaced. Nothing provided to the Court has evidenced this requirement. The terms of the Code provide the sole standard that will be used to determine whether Defendant's conduct constitutes an actionable offense.

[10] The letter sent by the Court on February 3, 2011, was not the first request for such information. On October 8, oral argument was held, and Plaintiff was instructed to provide the Court with the portion of the Middletown Code that required Defendant to perform procedures Plaintiff alleged were required. On October 27, 2010, Plaintiff provided the Court with additional submissions. In those materials, Plaintiff provided a letter from Scott Obdell, P.E. of Van Cleef Engineering Associates. In the letter, Mr. Obdell stated that Middletown follows DelDot specifications regarding curb construction requirements, and that DelDot specifications require that "a minimum of six inches of GABC type B shall be placed under all curbs and shall extend six inches beyond the back of the curb." Moreover, Mr. Lobdell stated that in his opinion, the method of using topsoil to fill the entire void is a violation of DelDot specifications and Middletown's Code. In response to Plaintiff's submission, Defendant contended that Plaintiff failed to

On February 21, 2011, Plaintiff's counsel submitted a letter to the Court, and attached a portion of the Code. Counsel directed the Court to consider two Sections. Section 28.04, which provides:

> Preparation of Foundation. The foundation shall be formed at the required grade to accommodate dimensions and designs shown on the plans for the bottom of the curb. Where the curb foundation is to be existing undisturbed soil, the foundation shall be firm and unyielding. All soft and yielding or other unsuitable material shall be removed and replaced with approved granular material. When the curb foundation is to be any material other than existing undisturbed soil the compaction and density requirements for the section covering that material shall govern. Where rock is encountered, the grade shall be excavated to 6" below the bottom of the curb and this depth shall be backfilled with approved granular material and shall then be thoroughly compacted. The foundation for curb forms shall be prepared sufficiently in length and width to provide for stable form support.[11]

In addition, Plaintiff's relied upon Section 28.11, which states:

> Backfilling. Immediately after the concrete has set sufficiently, the spaces in front and back of the curb shall be backfilled to the required elevation with suitable material which shall be tamped in layers of not more than 4", until firm and solid.[12]

On February 22, 2011, Defendant submitted a response in which it argued that the Code did not require the use of "Select Fill," and that Plaintiff has now had "three chances to show a Middletown Code requiring 'Select Fill' and has failed on all three

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comply with the Court's request because no section of the Middletown Code was provided. In addition, Defendant contended that Mr. Lobdell's opinion that the method used by Defendant was not compliant with the Code "constitutes a tacit admission that an expert is needed to support their claim." Defendant continued to assert its theory that Plaintiff cannot provide an applicable standard of care, and that it is now past the deadline to provide one, and that Plaintiff should not now be allowed to admit Mr. Lobdell's opinion through the backdoor.

[11] Pl.'s Letter, Feb. 21, 2011.

[12] *Id*.

occasions."[13] Defendant also contended that the testimony in this case demonstrates that the Defendant did that which was required by the Code.[14]

STANDARD OF REVIEW

A motion for summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[15] The moving party bears the initial burden of proof in showing that no material issues of fact are present.[16] The burden then shifts to the nonmoving party to show that there are material issues of fact in dispute.[17] In considering the motion, the court must view the record in a light most favorable to the nonmoving party, in this case, the Plaintiff.[18]

DISCUSSION

According to Delaware Rule of Evidence 702, "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify to thereto in the form of an opinion or otherwise." In general, the standard of care applicable to a professional can only be established through

[13] Def.'s Letter, Feb. 22, 2011.
[14] *Id*.
[15] Del. Super. Ct. R. 56(c).
[16] *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).
[17] *Id*.
[18] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

expert testimony, unless the professional's negligence is so obvious that a layperson can determine whether there was negligence.[19]

In this case, the standard of care applicable to Defendant's replacement of a curb is not within the knowledge of a layperson. Defendant dug out one to two foot trenches on either side of the curbs before removing them and filled the trenches with the original dirt. Defendant also used a practice called "tamping" to make the dirt more compact so that holes would not form after settlement.[20] Plaintiff alleges that this procedure was a breach of the standard of care that a reasonably prudent construction company would have used. However, whether a reasonably prudent construction company would have filled the trenches in a different manner is not within the common knowledge of a layperson. Without expert testimony as to the standard of care, a jury would be required to speculate. As a result, an expert would ordinarily be required to instruct the jury as to the applicable standard of a care. The Court, therefore, rejects Plaintiff's contention that no expert testimony is required, because the matter "is within the knowledge of a lay person."[21]

However, Plaintiff's negligence action is based on several theories, including, negligence *per se*. Plaintiff correctly notes that the Middletown Code provides the proper standard of care.

Section 28.04 of the Middletown Code provides:

> Preparation of Foundation. The foundation shall be formed at the required grade to accommodate dimensions and designs shown on the plans for the bottom of the curb. Where the curb foundation is to be existing undisturbed soil, the foundation shall be firm and unyielding. All soft and yielding or other unsuitable material shall

[19] *Abegglan v. Berry Refrigeration et. al.*, C.A. No.: 03-08-061 CLS, (Dec. 2, 2005).
[20] Pl.'s Resp. Ex. A., pg. 9.
[21] Pl.'s Resp. at 1.

> be removed and replaced with approved granular material. When the curb foundation is to be any material other than existing undisturbed soil the compaction and density requirements for the section covering that material shall govern. Where rock is encountered, the grade shall be excavated to 6" below the bottom of the curb and this depth shall be backfilled with approved granular material and shall then be thoroughly compacted. The foundation for curb forms shall be prepared sufficiently in length and width to provide for stable form support.[22]

In addition, Plaintiff's counsel noted that Section 28.11 states:

> Backfilling. Immediately after the concrete has set sufficiently, the spaces in front and back of the curb shall be backfilled to the required elevation with suitable material which shall be tamped in layers of not more than 4", until firm and solid.[23]

The foregoing Code Sections provide the applicable standard of care with respect to Plaintiff's negligence *per se* action. A jury will determine whether Plaintiff can meet her burden in proving that Defendant failed to meet the requirements set forth in the Middletown Code, and whether that failure was the proximate cause of Plaintiff's damages.

CONCLUSION

For the foregoing reasons Defendant's Motion is **DENIED**.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge

[22] Pl.'s Letter, Feb. 21, 2011.
[23] Id.